No. 2880

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLUE GOOSE MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

NORTHERN LIGHT MINING COMPANY
(a corporation),
Defendant in Error.

REPLY OF DEFENDANT IN ERROR TO PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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Plaintiff in error has asked this Court to grant a rehearing and reverse its decision herein on the sole ground that, in deciding that the president of a corporation, who is also its general executive officer, has the authority to employ counsel, this Court pointed out that the by-laws of the Blue Goose Mining Company expressly state that the "president shall be the general executive officer of the corporation". These by-laws not having been admitted into evidence by the trial Court, plaintiff in error assumes that there is no

evidence in the record to establish that Jafet Lindeberg was the general manager as well as the president of the Blue Goose Mining Company. Counsel state that the fact that Mr. Lindeberg was the general executive officer of the plaintiff in error is "without a shadow of support in the record". Yet in our reply brief herein (pages 27-30) we summarized a mass of evidence, excluding the by-laws, which conclusively demonstrates that Mr. Lindeberg was the general manager and indeed the "alter ego" of the Blue Goose Mining Company. And in asking this Court to reverse itself and hold that the appearance of counsel for plaintiff in error in the California action was unauthorized, counsel do not even mention the evidence proved out of the mouths of their own witnesses which establishes a clear ratification by the Blue Goose Mining Company of its president's act in employing attorneys and appearing in the California action, and which proves such a state of facts as would estop plaintiff in error in any court of justice from denying the authority of its president to act as he did.

Counsel now deny the right of this Court to consider the by-laws of the Blue Goose Mining Company set forth in the transcript, and question their authenticity. Speaking of these by-laws, counsel say:

> "It was merely offered in evidence and rejected (Tr. 120 et seq.), and we take it that an offer to prove a fact to which no oath had been made can hardly be taken as proof of

> such fact. Nor would there be any force in the argument that as the by-law in question was offered by plaintiff in error it would be assumed against such plaintiff that upon a retrial such alleged by-law could be proven. *There is no proof that this is the by-law* and therefore no warrant for the conclusion that it could on retrial be proven."

When we first read this astounding statement we could hardly believe our eyes. It passes belief that counsel could have the effrontery to themselves offer in evidence in the lower Court these by-laws of their client, incorporate them in the record on appeal, assign as error their exclusion and then assert in this Court that there is no proof that they actually are their client's by-laws and attempt to discredit them. In their assignment of errors (No. 19) which is signed by counsel for plaintiff in error, they say:

> "The Court erred in sustaining the objection of the plaintiff to the introduction in evidence of the by-laws of the defendant corporation, the same being marked defendant's Exhibit 'B', for identification, and which are as follows:" (by-laws quoted).

Now counsel even assert that in the event of a retrial defendant in error might not be able to establish the authenticity of these by-laws, presumably because defendant in error might have to rely for proof on the testimony of the officers of plaintiff in error. Here is a naive confession! We can hardly conceive how counsel, officers of this Court, and one of whom is concededly a director

and general counsel of plaintiff in error, can reflect on their own integrity by questioning the authenticity of the by-laws for which they have stood sponsor.

As a matter of fact the record shows that the parties to this action *actually stipulated* at the trial to the authenticity of these by-laws, and they were excluded by the trial Court because they were not considered material. The record reads as follows (Trans. pp. 120, 121):

"Mr. COCHRAN. We next offer in evidence the " by-laws of the Blue Goose Mining Company.

"Mr. ORTON. We object to the offer as being " entirely incompetent for any purpose.

"The COURT. I do not think that they are ad- " missible in this proceeding.

"To which ruling of the Court the defendant " then and there duly excepted, and an exception " was allowed.

"Mr. COCHRAN. Then I will have to read them " into the record. I offer to prove——

"Mr. GRIGSBY. Have the offer in writing then.

"Mr. COCHRAN. I offer in evidence the minute " book of the Blue Goose Mining Company. I " cannot make a proper offer until we get the sec- " retary or unless these gentlemen will waive this " technical objection.

"Mr. ORTON. For the purpose of your making " that offer, I will admit that that is the original " and genuine minute book of the corporation. I " have already used it myself. I admit that the

" by-laws of the corporation are written there on " pages 3, 4, 5, 6, 7, 8, and 9 and concluded on " page 10 and certified to by the secretary on " page 11. I will also admit that the minute book " shows they were regularly adopted, but I object " to the evidence as being entirely incompetent. I " object to having them read. It is a document " and can be marked and identified, and don't need " to be read. I am willing to substitute a copy " afterwards, you can have the original marked and " substitute a copy."

This stipulation was accepted by counsel for plaintiff in error and the necessity of producing the secretary of the Blue Goose Mining Company to establish the authenticity of the by-laws was avoided. The trial Court excluded these by-laws on the theory that they were immaterial since any unknown limitation contained in them upon the powers of the president could not affect third parties, particularly in view of the authority which the corporation had held him out to the public as possessing. If the effect of these by-laws had been to limit the authority of the president this ruling would have undoubtedly been correct (10 Cyc., pp. 351, 352, 925, and cases cited). But properly construed, these by-laws, as we pointed out in our reply brief herein (pp. 24-27), and as this Court has stated in its opinion, actually establish that the president was the general executive officer of the corporation and as such, under well settled law conceded even by counsel, he had the authority

to employ counsel. The by-laws were therefore probably relevant. However, in view of the fact that these by-laws clearly establish the authority of Mr. Lindeberg to employ counsel, the only point in this case, plaintiff in error cannot be heard to complain of their exclusion.

> "It is a rule of universal application that appellant cannot complain of errors which were favorable to himself."
>
> 4 Corpus Juris, p. 916;
>
> Bethell v. Mathews, 13 Wallace, p. 1; 80 U. S. 1.

With the authenticity of the by-laws established and the only point involved in action the power of the president to employ counsel, and that authority absolutely proven by these by-laws set forth in full in the record, why should this Court shut its eyes to such decisive evidence? Though properly authenticated the by-laws were excluded as being immaterial. The objection was practically a demurrer to the evidence, its truth being admitted. That this Court can and ought to consider this evidence seems so clear as to require no authority, but we cite a few that came readily to hand.

In the case of Town of Babylon v. Darling, (N. Y.) 100 N. E. 727, a patent was in the record on appeal though not included in the findings of the trial Court. Both parties, however had not questioned its authenticity and had used it as a found fact on appeal. The Appellate Court based its decision on this point and said that

"undisputed facts may be considered for the purpose of upholding the judgment".

To the same effect are the following

Dyke v. Spargur, 143 N. Y. 651; 38 N. E. 269;

First. Nat. Bk. v. Simpson, 54 S. W. 506;

Bajohr v. Bajohr, 184 S. W. 76;

Whitman v. Heath, 71 S. E. 313.

In First Nat. Bk. v. Simpson, supra, it was said:

> "It may be conceded that the effect of a demurrer, when interposed to plaintiff's evidence in either an equity or law case, is to admit every material fact to be true which the evidence tends to prove, as well as every reasonable inference to be deducible therefrom (Healy v. Simpson, 113 Mo. 340; 20 S. W. 881; Leeper v. Bates, 85 Mo. 224; Patton v. Bragg, 113 Mo. 600; 20 S. W. 1059; Seitz v. Mitchell, 94 U. S. 580; 24 L. ed. 179), as well, also, as that when legal and competent testimony is shown to have been offered upon the trial of an equity case, *and excluded, which is incorporated in the bill of exceptions,* so that the Supreme Court can pass upon it, it may be considered on appeal or writ of error. (Hanna v. Land Co., 126 Mo. 1; 28 S. W. 652; Goodrich v. Harrison, 32 S. W. 661.)"

Further it should be noticed that though these by-laws were not allowed into evidence that counsel for plaintiff in error themselves in their opening brief herein treated them as before this Court and argued that they showed that the president's act in employing counsel and paying them a fee of $1000 was in excess of his authority. In this connection

we would specially call the Court's attention to pages 49 to 51 of the brief for plaintiff in error on file herein. It does not lie in the mouths of counsel to object to this Court considering the authentic by-laws of the Blue Goose Mining Company after they have themselves offered and relied upon them, and asked this Court to rule that these by-laws established that the president had no authority to employ counsel as he did.

Counsel for plaintiff in error repeatedly assert that there is no evidence in the record, other than the by-laws, to show that Mr. Lindeberg had the authority belonging to the general executive of a corporation. There is no excuse for these assertions for on pages 27 to 30 of the brief of defendant in error, to which we would respectfully call this Court's attention, we summarized a mass of testimony in the record which, without consideration of the by-laws, should convince any reasonable person that Mr. Lindeberg has been and still is the president, general manager of the Blue Goose Mining Company and dominates and controls it.

The fact that Mr. Lindeberg was the general executive of the corporation and under the law had the power to employ counsel is so well established by the record and by the authorities that this Court did not consider it necessary in its opinion to comment on the propositions that the plaintiff in error actually ratified its president's

act in employing counsel and that plaintiff in error is now estopped, in view of its conduct, to question his authority. These propositions are fully discussed by us in our reply brief at pages 30 to 37 and we respectfully request the Court's consideration of that discussion in connection with the petition of plaintiff in error for a reversal. The facts in this cause, in our view, show such a clear case of ratification and estoppel as to preclude any chance for a writ of certiorari. And that plaintiff in error will use any pretext, no matter how unmeritorious, to delay the payment of this judgment is clear from its past conduct. After fighting the claim of defendant in error through the Appellate Courts of California, and even after, upon the affirmance of the judgment, employing other counsel, Messrs. Metson, Drew and Mackenzie, to apply for a rehearing in the California District Court of Appeal, plaintiff in error has the effrontery to contend that it never employed counsel in the California case and now even seeks to discredit its own by-laws offered in evidence and used and relied upon by its own counsel herein.

In view of such a course of conduct we respectfully ask this Court to find, as the facts warrant, that not only was Mr. Lindeberg, the president and general manager of the Blue Goose Mining Company, but that plaintiff in error ratified his act in employing counsel and appearing in the California action and that plaintiff in error is now

estopped, in view of its conduct, from questioning that act of its president.

We would respectfully ask that the petition of plaintiff in error for a rehearing be denied.

Dated, San Francisco,
November 19, 1917.

W. S. ANDREWS,
Attorney for Defendant in Error.